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**FILED**

**S. JUN 3 1958**

**JOHN T. FEY, Clerk**

**IN THE**

**Supreme Court of the United States**

**October Term, 1957**

**No. ~~999~~ 61**

**JOHN H. CRUMADY,**

*Petitioner,*

**JOACHIM HENDRIK FISHER, Har Engines, Tackle, Apparel, etc., and JOACHIM HENDRIK FISHER, and/or HENDRIK FISHER,**

*Respondents,*

**v.**

**NACIREMA OPERATING CO., INC.,**

*Impleaded Respondent.*

**PETITIONER'S REPLY TO RESPONDENTS' BRIEFS  
IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI**

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Supreme Court of the United States.

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*v.*

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APPAREL, ETC., AND JOACHIM HENDRIK FISSER,  
AND/OR HENDRIK FISSER,

*Respondents,*

*v.*

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*Impleaded Respondent.*

**PETITIONER'S REPLY TO RESPONDENTS' BRIEFS  
IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI.**

In urging that the petition for a writ of certiorari be denied, both respondents, the vessel and impleaded stevedore, Nacirema, contend that one of the two issues raised in the petition was never advanced or passed upon below and that, therefore, this court should not exercise its powers of review. Beside the fact that substantial justice would require a review, even if respondents' statement were correct, the fact is that the specific issue was raised and considered below. The great stress which the respondents place upon this diversionary point, and their complete neglect of the real issues in the case, support the contention that there is real need for a review of the issues raised in the petition.

When this case was tried in the district court, petitioner contended that the vessel was liable upon two grounds: (a) that the topping lift cable was defective; and (b) that the winch was unseaworthy because its cut-off device was improperly set. The trial judge found that the cable was sound, but that the vessel was unseaworthy because the circuit breaker in the winch had been set at an excessively high level. Since this fact contributed to the accident, he held the ship liable to the injured longshoreman.

The court then proceeded to determine the liability as between the vessel and Nacirema, the third party defendant. In this connection the trial court found that the ship's boom and tackle, which were employed to unload the lumber, had first been rigged by the ship's crew, but thereafter, in order to carry on the unloading operation, Nacirema had reset the position of the boom and supporting cables in such a manner as to place a greater strain upon the topping lift than upon the other gear, when this hoisting apparatus was put into operation. The trial judge held that this was an unsafe and dangerous condition which "brought into play" the unseaworthy condition of the winch to cause the accident. Upon this ground, the court held Nacirema liable over to the ship. Nacirema appealed from this decree and the vessel filed a protective appeal from the decree against it in favor of petitioner.

In the Court of Appeals, petitioner, as appellee, in support of the trial court's findings, was not required to argue anything other than the unseaworthy condition of the winch, as found by the district court. However, the Court of Appeals reversed the district court's finding that the winch was unseaworthy and held that the accident resulted solely from the improper setting of the boom and tackle. The Court of Appeals then assumed, without benefit of argument, that the ship could not be responsible for this condition because it had been rigged by Nacirema, and,

therefore, reversed the judgment which had been entered in favor of petitioner.

It was from this background that the issue of the vessel's responsibility for an unsafe condition caused by the stevedore came into the case. It was injected into the case by the decision of the Court of Appeals and not by any "switching of theories" as the respondents so repeatedly charge.

Confronted with the new issue raised by the decision of the Court of Appeals, petitioner filed a petition for rehearing, pointing out that under the various decisions of this court the shipowner may not divest himself of responsibility for injuries to longshoremen due to unsafe conditions caused by the stevedores. The Court of Appeals denied the petition for rehearing upon the ground that there was no merit in petitioner's contentions.

It is thus apparent that respondents' complaints that the issue here involved "was never advanced or passed upon below" are clearly unfounded and should be regarded as diversionary from the true issues presented by this petition.

On the merits, respondents slough off the issues raised by the petition and avoid direct challenge through the use of inaccurate generalities.

Respondents contend that there is no conflict between the decision in the instant case with those cited by petitioner, but they carefully refrain from meeting the specific facts or principles of those decisions. In referring to this court's decision in *Alaska S. S. Co. v. Peterson*, 347 U. S. 397, affirming 205 F. 2d 478, the respondent vessel states that the principles of that case only applies to those cases where equipment breaks because it is defective, whereas the expressed basis for the decision rests upon the warranty of seaworthiness and embraces every condition which renders the place of work unsafe. In commenting on the case of *Seas Shipping Company v. Sieracki*, 328 U. S. 85,

respondent vessel avoids the main principle and would distinguish the case on the ground that "this Court made specific reference to the fact that the weight being lifted when the accident occurred was well within the working capacity of the gear involved." That statement is, indeed, significant. Although it begs the real question in the *Sieracki* case, it does, however, support petitioner's contention in this case that the gear should not be subjected to a strain in excess of its rated working capacity. The working capacity in the *Sieracki* case was limited to the safe working load, as petitioner here contends, and not five times that amount, as the Court of Appeals erroneously assumed.

Respondent ship's comment on *Rogers v. U. S. Lines*, 347 U. S. 984, is likewise based upon an erroneous concept of that case. Respondents refer to that case only with the brief comment that it is distinguishable because the cable used in that case was defective. The opinions show exactly the contrary. There the cable was furnished by the longshoremen and it proved to be too short to reach into the sides of the ship's lower hold, and as a result the cable started to rewind after it had run out its full length and swung back injuring one of the longshoremen. There was no structural defect, as respondent states, but the cable as rigged was too short. Respondents carefully avoid the principle of that case which holds the shipowner liable for an unsafe condition, whether it be due to a structural defect, an unsafe setting or other unsafe condition.

Respondents' comment regarding the conflict with the decision of the Court of Appeals for the Second Circuit in *Grillea v. United States*, 232 F. 2d 919, likewise mistakenly construes the facts and the principle of law involved. Respondents pass over the *Grillea* case quickly with the attempted distinction that the case there involved "an accident resulting from an unseaworthy condition in the ship's structure and does not involve an accident occurring

because of a ship's misuse of equipment." In the *Grillea* case the opinion clearly shows that there was no structural defect as respondents state. On the contrary, one of the longshoremen improperly placed a hatch board in a wrong position so that it tilted when another longshoreman walked over it, causing injury. The court there held that when the hatch board was set in position it became a part of a pathway, and, since it was unstable, it rendered the vessel unseaworthy. The analogy between that case and the one at bar is most striking, and it is obvious that respondents' analysis both with respect to the facts as well as the law of that case is incorrect.

*Nacirema* attempts to distinguish the *Grillea* case on the ground that "a proper hatch cover which was placed over the padeye became an integral part of the vessel and rendered it unseaworthy." That comment applies with equal force to the instant case. The boom and tackle were set in a dangerous position here, as the hatch cover was in *Grillea*, and the boom and tackle as so set were no less an integral part of the vessel than the hatch cover. On this very point, Chief Judge Biggs, dissenting in the instant case, said: "This is a doctrine to the effect that a 'seaworthy' round peg in a 'seaworthy' square hole will render the whole unseaworthy."

The respondents' superficial analysis and comment of the pertinent decisions serve only to emphasize the conflict between those decisions with that of the court below. The second issue raised by the petitioner is also treated in a very perfunctory fashion. Petitioner has demonstrated that the Court of Appeals below, in reversing the trial court, failed to show that the findings of the trial judge were clearly erroneous, but reversed on the basis of a mathematical formula which finds no support and is contrary to the record. Respondents' failure to support the lower court's "mathematical formula" by any evidence in the record or by any scientific theory demonstrates that

*Petitioner's Reply*

the trial court's finding of unseaworthiness, admittedly based on competent evidence in the record, is not "clearly erroneous" and the trial court's finding in this respect should not have been reversed.

The diversionary arguments of the respondents emphasize not only the importance of the principles involved, but the merit of petitioner's contentions.

It is respectfully submitted that this court should exercise its power of review to the end that the decision of the Court of Appeals below be reversed.

Respectfully submitted,

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SIDNEY A. BRASS,

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